A LEGAL RESOURCE MANUAL FOR SCHOOL COUNSELORS IN WISCONSIN:

Legal and Ethical Considerations

By

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ABSTRACT

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A Legal Resource Manual for School Counselors in Wisconsin: Legal and Ethical Considerations
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The first purpose of this research study was to selectively examine and present the legal and ethical issues that affect and apply to school counselors in Wisconsin. The second purpose of this research study was to provide school counselors, school counselor trainees, and training institutions with a manual that analyzes the selected laws and ethical guidelines that apply to their profession.

The study focused on areas that oftentimes present questions or concerns for school counselors due to the nature of their jobs and their work with students, such issues as confidentiality and the disclosure of information, exceptions to confidentiality, pupil records, harassment and bullying issues, special education, malpractice and other legal concerns.

Relevant articles, statutes, case law, and other sources were reviewed and analyzed, and issues regarding the right to privacy, privileged communication, and informed consent were addressed in regard to students and parents. Additionally, the exceptions to confidentiality—child abuse or neglect, harm to self or others—as well as issues of sharing information with school personnel and parents, and group counseling were also presented for counselors.

The results of the study suggest that although there is much guidance for school counselors in terms of ethical and legal obligations and/or implications, there are still many questions left unanswered or subject to interpretation. The footnotes and appendixes provide additional resources for the reader. Finally, recommendations were made regarding the need for continuing research, education, and training of counselors.

ACKNOWLEDGEMENTS

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CHAPTER ONE

Introduction

Litigation, lawsuits, and liability—these are three words that have become part of the vernacular in the United States, and public education in particular. It seems no one is immune from lawsuits anymore, and because of the nature of such lawsuits, it is important that educators be aware of the laws that affect them in their professional lives. Issues concerning Individuals with Disabilities Education Act (IDEA), harassment, and the right to privacy have been addressed at in-services, conferences, and faculty meetings to facilitate such education. Still, it is this researcher's opinion that many educators feel uneasy with their knowledge and understanding of law surrounding these issues.

Specifically, school guidance counselors have become all too familiar with legal questions and concerns that are present in their jobs on a daily basis—informed consent, confidentiality, release of pupil records or pupil information, suicide, sexual activity among students, abuse, drug, alcohol and tobacco use—the list is long. Graduate programs provide instruction in the areas of law and ethics to school counseling students. However, aside from the fact that the laws surrounding education frequently change is the fact that oftentimes school counselors do not have such laws readily available or accessible to them, or perhaps do not even know where to look to find them. For example, school counselors may know that they have to report certain information, such as child abuse or sexual activity of a student under the age of sixteen, but they do not know what the force is behind such reporting or may never have seen or read the law that mandates such reporting.

As such, this researcher intends to examine and present selected relevant substantive laws (state statutes and codes, case law, and federal legislation) that may regulate or impact the profession of a school guidance counselor in Wisconsin public schools.

Purpose of the Study

The first purpose of this research study was to selectively examine and present the legal and ethical issues that affect and apply to school guidance counselors in Wisconsin public schools. The second purpose of the study was to provide school counselors, school counselor trainees, and training institutions with a manual that analyzes selected laws and ethical guidelines that apply to their profession. Such manual will be available online at the University of Wisconsin – Stout library website. Research was conducted during June and July 2002.

Definition of Terms

For clarity of understanding, the following terms need to be defined:

Behavioral records: Those pupil records which include psychological tests, personality evaluations, records of conversations, any written statement relating specifically to an individual pupil's behavior, achievement or aptitude tests, physical health records (other than immunization records or lead-screening results), law enforcement records, and any other records that are not progress records (Wis. Stat. §118.125(1)(a), 1999-2000).

Child: A person who is less than 18 years of age, or a person who is less than 17 years of age if the (alleged) perpetrator of a crime (Wis. Stat. §48.02(2), 1999-2000).

Directory data: Includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports,

weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received and the name of the school most recently previously attended by the student (Wis. Stat. §118.125(1)(b), 1999-2000; Family Educational Rights and Privacy Act of 1974 [FERPA]).

Education records (Family Educational Rights and Privacy Act of 1974 [FERPA]): Those records, files, documents and other materials which contain information directly related to a student, and are maintained by an educational agency or institution or by a person acting for such agency or institution (20 U.S.C. §1232g(a)(4)(A)(i)-(ii)).

Emotional Damage: Harm to a child's psychological or intellectual functioning which is exhibited by severe anxiety, depression, withdrawal or aggression. It may be demonstrated by observable changes in behavior, emotional response or learning which are incompatible with the child's age or stage of development (Wisconsin Department of Health and Family Services [Wis. DHFS]).

Harassment (Pupil): Behavior towards pupils based, in whole or in part, on sex, race, national origin, ancestry, creed, pregnancy, marital or parental status, sexual orientation or physical, mental, emotional or learning disability which substantially interferes with a pupil's school performance or creates an intimidating, hostile or offensive school environment (Wis. Admin. Code § [PI] 9.02(9), Oct., 2001).

Neglect: The failure, refusal, or inability on the part of a parent, guardian, legal custodian or other person exercising temporary or permanent control over a child, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child (Wis. Stat. §48.981 (1)(d), 1999-2000).

Physical Abuse: Physical injury inflicted on a child by other than accidental means. Physical injury includes, but is not limited to, lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm (Wis. DHFS).

Progress records: Those pupil records which include the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record, the pupil's immunization records, any lead screening records, and records of the student's school extracurricular activities (Wis. Stat. §118.125(1)(c), 1999-2000).

Pupil physical health records: Those pupil records that include basic health information about a pupil, including immunization records, emergency medical card, log of first aid and medicine administered to pupil, athletic permit card, record concerning pupil's ability to participate in education program, lead screening records, results of routine screening tests, and any other basic health information (Wis. Stat. §118.125(1)(cm), 1999-2000).

Pupil records: All records relating to individual pupils maintained by a school but does not include notes or records maintained for personal use by a teacher or other person who is required by the state superintendent to hold a certificate, license, or permit if such records and notes are not available to others, not does it include records necessary for, and available only to pupils involved in, the psychological treatment of a pupil (Wis. Stat. §118.125(1)(d), 1999-2000).

Sexual Abuse: Sexual intercourse or sexual touching of a child, sexual exploitation, forced viewing of sexual activity, or permitting, allowing or encouraging a child to engage in prostitution (Wis. DHFS; see also Wis. Stat. §48.02(1), 1999-2000).

Sexual Harassment: Unwelcome behavior of a sexual nature that interferes unreasonably with a student's ability to learn, study, work, achieve, or participate in

school activities. It is a form of sex discrimination, and includes such behaviors as insults, name-calling, offensive touching, intimidation by words or actions, off-color jokes, pressure for sexual activity, sexual assault and rape, etc. (Williams & Brake, 1998).

Assumptions

The researcher assumes that the readers of this paper have basic understanding of the legal system.

Limitations

There are few limitations that have been identified by the researcher. One limitation is that the laws frequently change over time. A second limitation is that the laws are subject to interpretation by judge, jury, or hearing officer. Because of these limitations, it behooves the readers of this research paper to make sure that they have the most current and accurate information and not rely on the information presented in this paper as such. A third limitation is that the researcher is presenting substantive information about the laws and is not presenting procedural information (e.g., how the court system works, how to file or defend an action in court, etc.). Additionally, this paper is not intended to be used as legal advice and should not be relied on as such. Readers are encouraged to seek proper legal advice from a licensed attorney. Finally, it is recommended that readers use the information herein as guidance only and are encouraged to consult with and seek advice from appropriate professionals regarding the interpretations and analysis of the laws and ethical guidelines in this paper.

CHAPTER TWO

Introduction

School counselors today are faced with expanding roles to include educator, confidant, advocate, parent, and friend (Tompkins & Mehring, 1993). According to the American School Counselor Association (ASCA), the role of the professional school counselor includes the following: counseling (individual and group), large group guidance, consultation, and coordination (ASCA position paper, 1999). In addition, many counselors may perform or be expected to perform other duties that are considered to be outside the scope of their job duties or competence (Remley & Herlihy, 2001).

Because of the many responsibilities inherent in the job of a school counselor, and the nature of the job in general (e.g., dealing with sensitive topics such as pregnancy or suicide), it is vital to his or her job, as well as the reputation of the profession, for a school counselor to be knowledgeable about the laws and ethical duties that affect and guide him or her in the performance of his or her duties (Davis & Ritchie, 1993). ASCA ethical guidelines (1998) state in E.1(c) that the professional school counselor "[s]trives through personal initiative to maintain professional competence and to keep abreast of professional information. Professional and personal growth are ongoing throughout the counselor's career."

Furthermore, the ASCA ethical guidelines expect counselors to be aware of and act in accordance with the standards and positions of the counseling profession, and it lists a number of resources about which the counselor can find these standards and positions (1998). Thus, there is an ethical duty on the part of counselor to stay up to date with current changes in the laws and other relevant information that affects them.

Confidentiality and the Disclosure of Information

Confidentiality and the disclosure of information (or the failure to disclose information) appear to be areas about which questions frequently arise in the field of school counseling (Tompkins & Mehring, 1993). Included under these topic areas are issues of informed consent, exceptions to confidentiality, sharing information with parents and professionals, and group counseling. These areas encompass so much of what is the role of the school counselor, and they are also the areas that are the most convoluted due to the nature of the job, the particular clientele, the confusion as to whether law or ethics or school policy control (McCarthy & Sorenson, 1993; Mickelson, 2002) (if there are any of these which speak to the particular situation at hand), and the complexity of such guiding forces in our practice[1].

The term confidentiality is often confused with other terms associated with private communication such as privileged communication and right to privacy, and this can create confusion as to whether keeping information confidential is a legal responsibility, a moral one, or an ethical one (McCarthy & Sorenson, 1993; Mickelson, 2002; Remley & Herlihy, 2001). For example, one tenet in the Preamble of the American School Counselor Association's Ethical Standards for School Counselors (ASCA ethical guidelines) states, "Each person has the *right to privacy* and thereby the right to expect

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[1] McCarthy and Sorenson (1993) state that counselors should be sure to examine the legal, ethical, and policy dimensions of the problems. They also state that legal requirements and laws (such as privileged communication) take precedence over ethical considerations, and, according to Tompkins and Mehring (1993, ¶13), "unless a privilege or confidentiality law exists in a state, confidentiality based on adherence to an ethical code is legally subordinate to employer policy." Thus it is important for school counselors to be knowledgeable about their district's policy regarding confidentiality (e.g., a school district's policy may require that certain behaviors (such as drug use) be reported to the principal; Davis & Ritchie, 1993; Mickelson, 2002).

the counselor-counselee relationship to comply with all laws, policies, and ethical standards pertaining to *confidentiality*" (italics added) (ASCA ethical guidelines, 1998). Both terms used in this tenet, as well as the words "laws", "policies", and "ethics" can confuse a school counselor as to the driving force behind such tenet as well as what responsibilities or obligations are imposed upon the school counselor.

Right to Privacy

The student's right to privacy is both a legal right and one of professional ethics, according to Jacob-Timm and Hartshorne (1993) (see also ASCA ethical guidelines, 1998). "*Privacy* is the broadest of the three concepts" and includes in it the concepts of confidentiality and privileged communication (Remley & Herlihy, 2001, p.80). It refers to the "right of persons to decide what information about themselves will be shared with or withheld from others" (Remley & Herlihy, 2001, p. 80).

Privacy rights can come from some of the amendments of the U.S. Constitution (Jacob-Timm & Hartshorne, 1998). For example, the Fourth Amendment guarantees the right of persons to be protected from unreasonable searches and seizure (Hummel, Talbott, & Alexander, 1985 cited in Jacob-Timm & Hartshorne, 1998). This protection has been expanded to protect students from unreasonable searches and seizure in schools (see *New Jersey v. T.L.O*, 1985 cited in McCarthy & Sorenson, 1993; Jacob-Timm & Hartshorne, 1998). The right to privacy for parents and students is also evident in the area of school records under the federal legislation entitled the Family Educational Rights and Privacy Act (Fischer & Sorenson, 1996; see "Pupil Records," p. 36). Privacy can also be found in the ASCA ethical guidelines (1998), as students have a certain expectation of privacy in their communications with their school counselors.

Confidentiality

Confidentiality is a term found in codes of professional ethics (McCarthy & Sorenson, 1993), and it basically refers to the expectation by the student that the information that s/he discloses to the school counselor will be kept private (Tompkins & Mehring, 1993). It does not have legal force behind it to protect such communication from disclosure (but see "privileged communication" in the next paragraph). On the other hand, for a breach of confidentiality, the school counselor may face action taken by the state licensing board (i.e., Wisconsin Department of Public Instruction [Wisconsin DPI]; Tompkins & Mehring, 1993) and/or may also subject him or herself to a malpractice lawsuit for such a breach (McCarthy & Sorenson, 1993)[2]. Additionally, as will be addressed later in this paper, a school counselor may face civil or criminal liability for failing to disclose certain types of confidential information (see "Exceptions to Confidentiality," p.22).

Privileged Communication

In comparison, privileged communication is a legal right of the client provided by state statute that protects confidential information from being disclosed in a legal proceeding (Davis & Ritchie, 1993; Mickelson, 2002). In order for the privilege to exist, there must be a statutorily defined relationship formed between the client and a certain

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[2] School counselors should be aware that modern technology can pose problems in terms of an inadvertent breach of confidentiality (Remley & Herlihy, 2001). For instance, storage of confidential information on one's computer may be safe (unless the counselor is unsure how to actually save or store the information or s/he leaves passwords in places where one can find them), however counselors should not leave confidential information on their computer screens in view of a third person. Also, fax machines, e-mail and voice mail (if using a PIN or access code) and cellular phones are not always secure and safe when using them to send confidential information (Remley & Herlihy, 2001). For more information, see Remley and Herlihy, pp. 123-130.

person (e.g., professional) as stated in state statute (Tompkins & Mehring, 1993). Additionally, the privilege (i.e., right to disclose the confidential information) belongs to the client, not the professional (Jacob-Timm & Hartshorne, 1998; Tompkins & Mehring, 1993). Thus, if called to testify or if subpoenaed to appear and/or bring records, the professional could assert that the confidential information disclosed in a statutorily defined relationship is privileged, *unless* the client consents to the disclosure of the information (italics added; Jacob-Timm & Hartshorne, 1998).

As stated above, the legal force of privileged communication exists only if provided by a state's statute (Tompkins & Mehring, 1993). In Wisconsin, two statutes that could possibly apply to school counselors in regard to privileged communications are: Section 905 ("Evidence-Privileges") and Section 118.126 ("Privileged communications," pertaining to alcohol and other drug use and abuse). First, according to Wisconsin statute section 905, communications designated by its statute as privileged are those made with persons with whom clients have a protected relationship, specifically attorneys, physicians, registered nurses, chiropractors, psychologists, social workers, marriage and family therapists, professional counselors, spouses, and clergy (Wis. Stat. §905.03-.06, 1999-2000).

According to Mickelson (2002), although this issue has not been litigated in court, the law firm of Lathrop and Clark has opined that services provided by a school counselor in the course of his or her professional duties would not be construed as "professional counseling" services[3] (comparing it to counseling in private practice), and

[3] For professional counselors, the confidential communications that are privileged under Wisconsin statute section 905.04(2) (1999-2000) are those "confidential communications made or information obtained or disseminated for purposes of diagnoses or treatment of

thus, such confidential communication between a school counselor and a student would likely not fall within the protection of privileged communication. In addition, the requirements for becoming licensed as a professional counselor under Wisconsin law (and thus falling within the definition of "professional counselor") are different than for school counselors (see Wis. Stat. §457.12, 1999-2000), thus, it may be likely that courts would find that school counselors are not professional counselors for purposes of privileged communication because they do not meet the criteria for licensure (although the definition of "professional counselor" includes the phrase "or an individual reasonably believed by the patient to be a professional counselor" [Wis. Stat. §905.04(1)(dm), 1999-2000]).

Furthermore, under Wisconsin statute section 118.126(1) (1999-2000), a school counselor "who engages in alcohol or other drug abuse program activities shall keep confidential information" received from student that s/he or another student is using or experiencing problems resulting from the use of alcohol or other drugs. The exceptions to this statute would be if the student who is using or experiencing problems consents in writing to the disclosure, or the counselor has reason to believe that there is serious or imminent danger to the health, safety or life of any person and that disclosure of the information will alleviate such danger, or the counselor is mandated by law to report under Wisconsin statute section 48.981 (child abuse or neglect; Wis. Stat. §118.126 (a)-(c), 1999-2000). The statute also provides immunity from civil liability if the counselor who engages in alcohol or other drug abuse program activities in good faith either discloses or fails to disclose such information (Wis. Stat. §118.126 (2), 1999-2000).

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the patient's physical, mental or emotional condition…" which are normally not the duties of a school counselor (Mickelson, 2002).

This statute can cause some confusion among school counselors. First, the term "program activities" is not defined. Arguably school counselors do alcohol or other drug activities when they are administering assessments to students following underage drinking incidents, leading an extra-curricular club or function that focuses on alcohol or other drug abuse prevention, or discussing the topic of alcohol and drugs as part of the school district's guidance curriculum. Second, it can be argued that alcohol or other drugs *in any capacity* creates (or has the potential to create) a serious and imminent danger to the health, safety or life of that student (see also Davis & Ritchie, 1993 [questions whether information of an upcoming party with alcohol can be construed as a danger to self or others, especially if a student is injured or killed in a car accident]).

Finally, the civil immunity provision again states "counselor…*who engages in alcohol or other drug abuse program activities*, who in good faith discloses or fails to disclose…is immune from civil liability…" (italics added; Wis. Stat. §118.126(2), 1999-2000). This begs the question: is a counselor who is *not* engaged in those program activities but receives such information, and who discloses or fails to disclose in good faith, *not* immune from liability? Aside from the perceived confusion that this statute seems to present, it is wise for counselors to remember that school district policy may require the disclosure of such information (which is arguably conflictive with the statute as well as one's ethical commitment not to disclose; D. J. Mickelson, personal communication, July 22, 2002), so counselors need to be sure to consult with district policy and/or with their supervisors (Davis & Ritchie, 1993; Mickelson, 2002).

Informed Consent

All school counselors and school counselor trainees need to know that they are required to provide students with information about their rights in the counseling relationship, including limits to confidentiality, prior to starting any school counseling services with him or her (ASCA ethical guidelines, 1998; Davis & Ritchie, 1993; Remley & Herlihy, 2001). Informed consent means that in order for a student to consent to school counseling services, s/he must be informed of the purpose and expected outcomes of those services (ASCA ethical guidelines, 1998; Davis & Ritchie, 1993). In addition, the counselor must tell the student that there are certain types of information, if disclosed to a school counselor, that s/he is required by law (and by professional ethics) to report (Remley & Herlihy, 2001).

Informed consent must be knowing (clear understanding), competent (legally competent to give consent), and voluntary (no coercion, duress, misrepresentation, or undue influence) (Bersoff & Hofer, 1990; Weithorn, 1983 cited in Jacob-Timm & Hartshorne, 1998). Finally, as Jacob-Timm and Hartshorne (1998) stated, the informed consent is not to be presented as *notice* to the student or parent of the counseling services and limitations of confidentiality, but rather must allow the student or parent an opportunity to express that they understand the information presented to them and that they would like to continue with the counseling anyway.

ASCA imposes the responsibility on the counselor to obtain informed consent from the student. Under A.2(a) of the ASCA ethical guidelines (1998), a school counselor must

> "[I]nform the counselee of the purposes, goals, techniques, and rules of procedure under which s/he may receive counseling at or before the time

> when the counseling relationship is entered. Disclosure notice includes confidentiality issues such as the possible necessity for consulting with other professionals, privileged communication, and legal or authoritative restraints. *The meaning and limits of confidentiality are clearly defined to counselees through a written and shared disclosure statement*" (italics added).

Thus, according to A.2(a) of the ASCA ethical guidelines (1998), school counselors are to share the consent limitations in written form to their students prior to any counseling services. Whether or not this practice is actually implemented by school counselors in Wisconsin, in this researcher's opinion, it behooves counselors, in addition to verbally explaining limitations of confidentiality to students, to have in writing on their desks or bulletin boards, a statement of the limitations of confidentiality for the student to see[4]. Additionally, informed consent should also be phrased in language that the student understands, depending on his or her age (Davis & Ritchie, 1993). Davis and Ritchie (1993) go even further and advise the school counselor who plans on working with a student on "personal and social issues not clearly related to the curriculum," to obtain written consent from either the student or the student's parent(s) or legal guardian, if the student is a minor (see "Parents and Minor Children," p. 20).

The ASCA ethical guidelines also instruct the counselor under A.2(b) to keep "information confidential unless disclosure is required to prevent clear and imminent danger to the counselee or others or when legal requirements demand that confidential information be revealed. Counselors will consult with other professionals when in doubt

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[4] Remley and Herlihy (2001) suggest that counselors consider publishing information about their services in documents provided to parents when they enroll a child in school. Also, it may be wise to print information about informed consent and exceptions to confidentiality (as well as services provided to students) in student handbooks (Brougham, 1997; Remley & Herlihy, 2001).

as to the validity of an exception" (ASCA ethical guidelines, 1998). Thus, according to ASCA, there is an ethical obligation on the part of the school counselor to keep the student/client or other students safe from imminent harm. It is stressed in the ASCA ethical guidelines (1998, A.2(b)), and is emphasized in this paper, that school counselors are to consult with other professionals if there is a question as to the legitimacy or validity in breaching confidentiality of a student (see also Tompkins & Mehring, 1993 [it is advisable to consult with other counselors]; Dansby-Giles, n.d.]).

Thus, in order to insure that the students understand what information the counselor can and cannot keep secret, the school counselor must, in a clear and age-appropriate manner, inform the student that there are certain circumstances in which s/he will have to breach confidentiality (ASCA ethical guidelines, 1998; Davis & Ritchie, 1993).

Parents and minor children[5]

It would be an error to exclude from this paper the implications of counseling minor students in the school setting, as nearly all of the students are minors in the eyes of Wisconsin law, as they are under the age of 18 (see definition of "Child" in Wis. Stat. §48.02(2), 1999-2000). According to Remley and Herlihy (2001, p.103), "counselors have an ethical obligation of privacy to minor clients, and a legal obligation to the parents or legal guardians of those same minor clients to keep their children safe." This can seem

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[5] For a thorough review of the rights of minor clients and their parents in a counseling relationship (as well as useful tips for working with minors and their parents), see Remley and Herlihy (2001), pp. 175-185. (See also Ledyard, 1998).

In 1999, Wisconsin legislature created a statute which mandates reporting by school teachers, counselors, social workers, or administrators to social services if s/he knows that a child is without a parent or guardian (not including kinship care relative or legal custodian; Wis. Stat. §118.175, 1999-2000).

conflictive for school counselors who are trying to establish a confidential and trusting relationship with their students, and yet legally have to answer to parents' inquisitions about or demands for information about their counseling sessions (Davis & Mickelson, 1994).

Basically, for students who are minors, the law states that they do not have the ability to make informed, voluntary decisions about the counseling services and the rights and limitations of confidentiality (Davis & Mickelson, 1994). Because the privacy rights of minor children legally belong to or are vested in their parents or guardians, (ASCA brochure, 1994; Remley & Herlihy, 2001), it is the parents or guardians who have the right to obtain information about and to give consent to the counseling services, and to consent to the release of information to third parties (Brougham, 1997). However, as stated above, "a child, regardless of age, has an ethical right to privacy and confidentiality in the counseling relationship" (Remley & Herlihy, 2001, p. 176).

Remley and Herlihy (2001) claim that legally, school counselors do not have to obtain parent or guardian consent prior to counseling students (unless there is a state or federal law which says otherwise) due to the fact that they should be aware that by enrolling their child in school, their child may be participating in those school services. Another source follows this line of reasoning by stating that it is legal to initiate a counseling relationship with a minor without the consent of his or her parent if the counseling is part of the curriculum and if the counseling services are within the scope of the counselor's job duties (Brougham, 1997).

Similarly, as stated above, if the counseling pertains to sensitive, "personal or social issues not clearly related to the curriculum," or if it becomes long-term counseling,

it is wise for counselors to obtain consent in writing from a parent or legal guardian (i.e., obtain informed consent; Davis and Ritchie,1993, ¶13). According to Mickelson (1998), a good rule of thumb is if more than six individual counseling sessions are necessary, the counselor should consider referring the student to another professional. And finally, if services could result in a "significant intrusion on personal or family privacy beyond what might be expected in the course of ordinary classroom and school activities," the Hatch Amendment (also known as "Protection of Pupil Rights") suggests obtaining parent consent for these services (Corrao & Melton, 1988; also see Bersoff, 1983; DeMers & Bersoff, 1985 cited in Jacob-Timm & Hartshorne, 1998, p. 45).

Although there is no clear-cut answer to when, how, and what information to release to parents, it is important that the school counselor consult with the student in advance about the possibility of disclosing information (i.e., informed consent), and then if the situation arises, consult with him or her again to try and work together to find a way to disclose to the parents (Remley & Herlihy, 2001). (See "Sharing Information with Professionals and Parents," p.28.) It is important to note that the ASCA ethical guidelines (1998, B.2(c)) obligate the school counselor to make "reasonable efforts to honor the wishes of parents and guardians concerning information that s/he may share regarding the [student]."

Exceptions to Confidentiality

Child Abuse or Neglect

When is a counselor required by professional ethics and/or mandated by law to disclose otherwise confidential information? According to Jacob-Timm and Hartshorne (1998), state statutory law and common law impose a duty on school personnel to keep

students safe while under their supervision. Under ASCA ethical guidelines, the counselor must disclose confidential information to prevent clear and imminent danger to the counselee or others (ASCA ethical guidelines, 1998).

According to Wisconsin law, a school counselor is *required* to disclose otherwise confidential information if "having reasonable cause to suspect that a child seen in the course of professional duties has been abused or neglected or having reason to believe that a child seen in the course of professional duties has been threatened with abuse or neglect and that abuse or neglect of the child will occur" (Wis. Stat. §48.981(2), 1999-2000)[6]. It is important for school counselors to remember that certainty that abuse has occurred is not required, but rather suspicion of abuse is the legal requirement and must be reported immediately (McCarthy and Sorenson, 1993; Wis. Stat. §48.981(4), 1999-2000).

In short, a counselor who, during his or her meetings with a student at school, hears information that leads him or her to believe that the student has been abused or neglected, has been threatened with abuse or neglect, or that abuse or neglect will occur in the future, must immediately report this information to the proper authorities, usually the county Department of Social Services (Wis. Stat. §48.981(3)(a), 1999-2000). (See Appendix A for resources pertaining to reporting abuse). It is important that the

[6] "Abuse" under Wisconsin statutes includes physical, sexual and emotional abuse (see Wis. Stat. §48.02(1), (5j), (14g), 1999-2000). It also includes serious physical harm actually inflicted or risk thereof to an unborn child caused by the "habitual lack of self-control" of the pregnant mother in the use of alcohol, controlled substances or controlled substance analogs, exhibited to a severe degree (Wis. Stat. §48.02(1)(am), 1999-2000).

counselor maintain records of calls to social services in the event there is any question about the situation[7] (ASCA brochure, 1994; Remley & Herlihy, 2001).

Counselors may be reluctant to report abuse for fear that by reporting (and thus breaching confidentiality) they may lose a child or family's trust (Remley & Herlihy, 2001), or they may face legal repercussions for reports that are later disconfirmed (McCarthy & Sorenson, 1993). Aside from the effect that reporting may have on the counseling relationship, what is the effect on the counselor by making such a report, especially if determined unsubstantiated? School counselors must remember that it is the responsibility of social services agency to investigate (and confirm or disconfirm) the allegations of abuse or neglect, not school personnel responsibility (Jacob-Timm & Hartshorne, 1998). Thus, the counselor need only suspect abuse or neglect to make the report; s/he does not have to have proof. In terms of the effect on the school counselor's job, Wisconsin statute section 48.981(2) states in the last sentence "No person making a report under this subsection may be discharged from employment for so doing" (1999-2000).

In addition, school counselors who report child abuse or neglect are immune from both civil and criminal liability for such reporting, regardless of the outcome, and as long as the report is made in good faith (Wis. Stat. §48. 981(4), 1999-2000); however, under Wisconsin law they can be held criminally liable for *not* reporting. Wisconsin statutes section 48.981(6) states the penalty for intentionally failing to report as required to be a

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[7] ASCA recommends that school counselors keep brief notes on those students with whom the counselor meets on a regular basis. It is especially important to keep notes on those situations where there are potential ethical or legal issues (e.g., harm to self or others, child abuse or neglect, etc.; ASCA brochure, 1994; see also Remley & Herlihy, 2001, Figure 5-1, p. 118).

fine of not more than $1000 and/or imprisonment for not more than 6 months (1999-2000). Thus, counselors risk being criminally liable for intentionally failing to report child abuse or neglect as mandated under Wisconsin law.

Sexual Activity as Child Abuse

Another area that can fall under the umbrella of child "abuse" is that of sexual activity of a minor student. This area is often complex as whether or not a person must report is dependent on the nature of the sexual contact, the age of the student and the other individual involved, the voluntariness of the action, and whether the student is obtaining or has obtained health care services (Dibble, 1999; "Sharing information," 2001). The questions that a counselor must ask a student when the issue of sexual activity comes up is whether or not it is sexual contact or sexual intercourse, his or her age and the age of the other person involved, whether it was consensual, and what services, if any, the student is obtaining (Dibble, 1999).

In regard to children under the age of 16, the law is fairly clear. First, sexual contact or sexual intercourse with a child who is under 16 years old is a felony (Wis. Stat. §948.02(1), (2), 1999-2000). Second, consent is not a defense to these activities because the state of Wisconsin presumes that a child under the age of 16 is incapable of consenting to sexual activity of any kind (Dibble, 1999 citing a letter from 03/15/94 DHFS Office of Legal Counsel opinion which cites a 1983 Attorney General opinion). Third, sexual activity with a child under 16 falls under the definition of "abuse" under Wisconsin statute section 48.02(2). Thus, if a child is under the age of 16 discloses that s/he is engaging in sexual activity of any kind, according to Wisconsin law, the school counselor must report to social services for investigation of abuse because it falls within

the definition of abuse under Wisconsin statute section 48.02(2) (Dibble, 1999; Guidelines on Teens, 1999; but see "Exceptions to reporting")[8].

It is interesting how Wisconsin law guides the sexual activity of 16- and 17-year olds as the law does not appear to mandate reporting this activity unless it was found to be coerced or involuntary (Dibble, 1999; Guidelines on Teens, 1999). Pertaining to sexual intercourse, the law states, "whoever has sexual intercourse with a child who…has attained the age of 16 is guilty of a Class A misdemeanor" (Wis. Stat. §948.09, 1999-2000). This can be interpreted to mean that a person of *any age* who has sex with a child aged 16 or 17 is guilty of a misdemeanor[9]. Again, this is not a reportable incident (it does not fall within the definition of "abuse" under the Wis. Stat. §48.02(2)) as long as the reporter feels that the child consented to the activity (Dibble, 1999)[10].

In regard to sexual contact, there is no statute in Wisconsin that speaks to sexual contact with a child aged 16 or 17 (Dibble, 1999). According to Wisconsin Coalition Against Sexual Assault, this has been interpreted to mean that this type of activity with a

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[8] The statute states "A…counselor…having reasonable cause to suspect that a child *seen in the course of professional duties* has been abused or neglected…." (italics added; Wis. Stat. §48.981(2), 1999-2000). A question exists as to whether or not a counselor would have to report if a 16 or 17 year-old disclosed to the counselor that s/he was engaging in sexual activity with a student under the age of 16 (if the counselor was not seeing the younger student). Technically, according to Dibble (personal communication, July 29, 2002), a counselor would not have to report by law, but there may be ethical issues to consider in this situation.

[9] If there is a large gap between the age of the student and the other individual, this factor may be cause to question the voluntariness of the sexual activity (Dibble, 1999).

[10] Dibble cites "a letter from the DHFS office of Legal Counsel dated 3/15/94 (citing a 1983 letter from the Wisconsin Attorney General opinion which states "consensual sexual contact involving 16- and 17-year old children does not constitute child abuse under sec. 48.981(2)")" concludes that voluntary sexual activity of children age 16 or 17 does not fall within the definition of "child abuse." Thus, "there is no reporting requirement in that regard and no authority under sec. 48.981for DSS to investigate reports of such activity," (Dibble, 1999).

16-or 17-year old is not automatically against the law (Guidelines on Teens, 1999). Thus, as stated above, activity regarding sexual contact with a 16- or 17-year old is not a reportable incident, unless the voluntariness of the activity by the student is in question (Dibble, 1999; Guidelines on Teens, 1999).

There are exceptions to the reporting requirement under Wisconsin statutes section 48.981(2m). Health care providers who are providing health care services to a child are excepted from the reporting requirement (Wis. Stat. §48.981(2m)(c)(1), (4), 1999-2000). Also, according to the statute, "a person who obtains information about a child who is receiving or has received health care services from a health care provider" is excepted from the reporting requirement (Wis. Stat. §48.981(2m), 1999-2000). This particular provision in the statute leaves some questions unanswered, however, such as "How can a person know for sure that a child has obtained health care services from a health care provider?" and "What if a student informs the person that she is going to be going to her health care provide soon (today, tomorrow, next week) for services?" Dibble (1999) states that it is unclear whether such exception to the reporting requirement includes those pupil services staff who learn from a student that s/he has accessed health care services and is sexually active.

There are also exceptions to the exceptions. In other words, there are five situations under Wisconsin statute section 48.981(2m)(d) in which a health care provider or a person who obtains information about the provision of health care services must report the information (1999-2000). These persons are required to report if they have reason to suspect that: 1) the sexual intercourse or contact occurred with a caregiver; 2) the child suffered or suffers from a mental illness or mental deficiency that rendered or

renders the child temporarily or permanently incapable of understanding or evaluating the consequences of sexual intercourse or contact; 3) the child, because of age or immaturity, was or is incapable of understanding the nature or consequences of sexual intercourse or contact[11]; 4) the child was unconscious at the time of the act or for any other reason was physically unable to communicate unwillingness to engage in sexual intercourse or contact; and 5) another participant in the sexual contact or intercourse was or is exploiting the child (Wis. Stat. §48.981(2m)(d)(1)-(5), 1999-2000). These persons are also required to report if they have reasonable doubt about the voluntariness of the child's participation in the sexual intercourse or contact (Wis. Stat. §48.981(2m)(e), 1999-2000).

Harm to Self or Others

Two additional areas that school counselors are required to report if disclosed to them during counseling meetings with a student are harm to that student's self or harm to others (Davis & Ritchie, 1993). The ASCA ethical guidelines comment on this area in three sections. Under A.2, the guidelines state that information obtained in the counseling relationship shall be kept confidential "unless disclosure is required to prevent clear and imminent danger to the counselee or others." The guidelines also state under A.7. ("Danger to Self or Others") that the school counselor is to

> [inform] the appropriate authorities when the counselee's condition indicates a clear and imminent danger to the counselee or others. This is done after careful deliberation and, where possible, after consultation with

[11] This exception may appear to reiterate what is already presumed by law (i.e., that a child under 16 is incapable of consenting to sexual activity due to age), however according to Dibble (personal communication, July 29, 2002), the intent of the legislature in creating this exception was to encourage minors to seek health care services without concern of being reported. Thus, under this exception, the decision to report will be based upon the professional judgment of the reporter as to the child's maturity and ability to understand the consequences of his or her actions (N. Dibble, personal communication, July 29, 2002).

> other counseling professionals. The counselor informs the counselee of actions to be taken so as to minimize his or her confusion and to clarify counselee and counselor expectations (ASCA ethical guidelines, 1998, A.7).

Finally, under section D.1(b) ("Responsibilities to the School"), the school counselor will inform school officials of "conditions that may be potentially disruptive or damaging to the school's mission, personnel, and property while honoring the confidentiality between the counselee and counselor."

As is the case with child abuse or neglect, the information revealed in the school counseling session is not always an obvious or clear indication of suicide or harm to others. A student may disclose that she feels as though her "life is over" after a break-up with a boyfriend. Does this comment constitute a suicidal threat? Another student may state that he wishes that he would never have to see his ex-girlfriend again because he is not sure what he will do if he sees her. Should the counselor report this statement as a threat of harm to others? A kindergartner makes a threat about using a machine gun or an AK47 to shoot up the school. Is this a serious threat? Obviously some questions must be asked on the part of the counselor to insure that the statements are threats and not merely a means of working through their grief and anger (Corey, Corey, & Callanan, 1993). Some things to take into consideration are the age of the student, the ability of the student to carry out the threat, whether the student has the means to carry out the threat, whether there is an identifiable target person, whether there is a suicide plan, etc. (Costa & Altekruse, 1994; Pietrofesa et al., 1990 cited in Isaacs, 1997; Jacob-Timm and Hartshorne, 1998).

Suicide

Wisconsin statute section 118.295 (1999-2000) states that any school board employee "who, in good faith attempts to prevent suicide by a pupil is immune from civil liability for his or her acts or omissions in respect to the suicide or attempted suicide." For example, this could be read to mean that as long as a school counselor makes a good faith effort to prevent the suicide, s/he would not face civil liability for his or her disclosure or lack thereof of this information to a third party. However, s/he might face ethical repercussions for not complying with his or her responsibility to disclose this information under the ASCA ethical guidelines (1998, A.2(b)), and the district might face a negligence claim[12]. However, the Seventh Circuit Court of Appeals (federal court--Wisconsin is part of this circuit) has ruled that a school district "lawfully can punish a counselor for failing to report a student's suicidal tendencies," (Simpson, 1999, p.25).

In any event, these situations are complicated and should be investigated with seriousness by the counselor. Certainly this is a balancing act--the counselor must weigh the immediate danger of the situation against the sanctity of the counseling relationship (Davis & Ritchie, 1993). As Davis and Ritchie (1993, ¶18) state, "[b]reaking confidentiality in these cases could jeopardize the counselor's relationship with the students; failing to break confidentiality might jeopardize their lives." As is always the case in these types of situations in which the answers are unclear, consultation with other school counselors is a must (ASCA ethical guidelines, 1998; Brougham, 1997; Davis & Ritchie, 1993; Remley & Herlihy, 2001).

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[12] See p. 42 under "Malpractice and other legal concerns."

If disclosure is warranted in a situation of potential suicide, to whom or what agency does the school counselor report this information? It is always good practice for a school counselor to attempt to obtain consent from the student as well as explain the legal limitations prior to disclosure to anyone (Remley & Herlihy, 2001). Many districts have policies as to these types of issues, so it is important that the counselor investigate their district's policy and speak with a suicide prevention specialist (e.g., perhaps a school psychologist) (Jacob-Timm & Hartshorne, 1998). Contacting parents or legal guardians about such threats is advisable, and it is strongly recommended that the student not be left alone until s/he can be released to a parent or guardian, however if a parent or guardian cannot be reached, the school counselor should refer to the appropriate agency (e.g., police department; Jacob-Timm & Hartshorne, 1998).

Harm to Others

In addition to suicidal threats are those threats to other persons—students, parents, teachers, administrators, or community individuals. Do school counselors have a duty to warn those persons of intent to harm them by the student?[13] The ASCA ethical guidelines provide for an exception to confidentiality in this situation (1998, A.2(b)). This "duty to warn" obligation has been an issue that is neither clear to school counselors nor resolved for professionals in the mental health arena due to the fact that some states have rejected this ruling, and other states have similar provisions in their state statutes (Remley & Herlihy, 2001). Also, it is a difficult decision to possibly breach

[13] For an analysis of the counselor's duty to warn and protect students, see an article by Isaacs, M. L. (1997) entitled "The duty to warn and protect: Tarasoff and the elementary school counselor." (See "Appendix A: References" p. 59).

confidentiality on the basis of a counselor's prediction that someone may cause harm to someone else (Remley & Herlihy, 2001).

The landmark case of *Tarasoff v. Regents of University of California* (1976) held that mental health practitioners, who during the course of counseling a patient, learn that the patient intends to do serious bodily harm to a known or identifiable person, have a duty to warn that person of such impending harm (*Tarasoff,* 1976 cited in Fischer & Sorenson, 1996). In general, Wisconsin case law appears to hold that as long as it is foreseeable that harm could occur to some other person, the duty of care is imposed on that person (*Gritzner v. Michael R*., 2000). It is unclear whether or not this applies directly to school counselors in these types of situations, imposing on them a duty to warn all potential victims if such possible harm is disclosed to them during a meeting with a student. Regardless, due to the fact that school counselors work in a confined place (a school), it is important that they report any behaviors or comments that are threatening or suspect (D.J. Mickelson, personal communication, July 22, 2002).

Schoener, 2001, states that at this time Wisconsin does not have a statute that imposes a duty to warn on professionals including school counselors. Thus, although there may not be a legal obligation on school counselors to disclose confidential information about potential harm to another person, there appears to be an ethical, and likely a moral, commitment on the part of the counselor to ensure the safety of the student and other persons[14]. Again, it is important for school counselors to consult with their professional colleagues and a supervisor, or the school district's attorney in these

[14] Two sources suggest that because communication with school counselors is not likely to be considered "privileged communication" (but see Wis. Stat. §118.126), they may be expected to, without hesitation, warn those possible victims of such potential harm (Brougham, 1997; Fischer & Sorenson, 1996).

situations (Brougham, 1997; Isaacs, 1997; See "Malpractice and other legal concerns", p. 42).

Sharing information with Personnel or Parents[15]

Another area in which there is some confusion about ethical and legal obligations is that of disclosure of confidential information by a counselor to other professionals and parents. This situation is especially tricky when a school counselor is approached for advice about a student or is referred a student by a teacher or parent, and then is later approached about the results of the meeting with the student.

From an ethical standpoint, the school counselor is expected to establish and maintain professional relationships with school personnel in order to facilitate counseling services (ASCA ethical guidelines, 1998). A counselor is further expected to "promote awareness and adherence to appropriate guidelines regarding confidentiality; the distinction between public and private information; and staff consultation" (ASCA ethical guidelines, 1998, ¶C.2(a)). Additionally, the counselor is expected to provide personnel with "accurate, objective, concise, and meaningful data necessary to adequately evaluate, counsel, and assist the counselee" (ASCA ethical guidelines, 1998, ¶C.2(b)). Finally, if a student is receiving counseling services from an outside mental health counselor or professional, the counselor, with the student's consent, "will inform the other professional and develop clear agreements to avoid confusion and conflict or the counselee" (ASCA ethical guidelines, 1998, ¶C.2(c)).

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[15] For information about what schools can disclose to other agencies and what other agencies can disclose to schools, as well as additional resources, consult *Sharing Information Across Systems* (August, 2001) from the Wisconsin Department of Public Instruction located online at www.dpi.state.wi.us/dpi/dlsea/sspw/sharing.html.

From a legal standpoint, the right to privacy as a legal right is vested in the parents of a minor child (ASCA brochure, 1994). ASCA states that legally, minors lack the capacity to make fully informed, voluntary decisions (ASCA brochure, 1994; Davis & Mickelson, 1994). ASCA asserts that parents "probably have a right to have access to information and/or counseling notes" concerning their child (ASCA brochure, 1994, No. 3)[16]. Likewise, Remley and Herlihy (2001, p. 177) state that unless a state statute or legal precedent hold otherwise, parents or guardians "probably have a legal right to know the content of counseling sessions with their children." There are obviously better ways of handling this issue than to automatically disclose all to a parent (Mickelson, personal communication, July 22, 2002). McCarthy and Sorenson (1993) state that counselors are expected to use their professional expertise and judgment in determining what information they should share with a parent.

What does this mean for school counselors in a practical sense? According to the ASCA ethical guidelines, it is the responsibility of counselors to ensure that personnel and parents understand that the relationship between a counselor and a student is based on information being kept confidential; although it appears that some information can be revealed to help the student (ASCA ethical guidelines, 1998, B.2(b), (c), C.2(b)). Davis and Ritchie (1993) aver that counselors can apprise teachers and parents of a student's progress without breaching confidentiality by explaining to the student (through informed consent) the reasons for the disclosure (e.g., to help a student succeed in school). Included in this explanation to the student should be to whom the information will be

[16]But see the section on Family Educational Rights and Privacy Act (FERPA), section "Pupil Records," p.31 of this paper) which states that a counselor's private notes, if not shared with anyone other than a substitute and in the sole possession of the counselor, are not educational records and thus parents do not have the right to access them.

revealed and the exact nature of the information (Davis & Ritchie, 1993). If the student does not consent to this information being disclosed, Davis and Ritchie (1993) state that counselors should honor this request. Honoring the request can be problematic, however, as a parent probably has the legal right to this information, and the child should be aware that the counselor, by law, may have to disclose information to parents if they demand it (Mickelson, 1998). In other words, it is not whether or not school counselors *should* tell the parents, but rather *how* school counselors will tell the parents (Mickelson, personal communication, July 22, 2002).

Group counseling[17]

In terms of ethical implications for group work in the school setting, the ASCA ethical guidelines imparts obligations on the school counselor to screen prospective group members, maintain an awareness of the particpants' needs and goals in relation to the goals of the group, and to take reasonable precautions to protect other group members from both physical and psychological harm resulting from participating in the group (ASCA ethical guidelines, 1998, A.7). In addition, school counselors should obtain informed consent from the participants (and/or their parents and guardians) prior to starting a group (Gazda, Ginter, & Horne, 2001).

Although a school counselor can insure that s/he will maintain confidentiality of the group members for what is disclosed in group counseling sessions, the same assurance cannot be made for the other members of the group (Gazda et al., 2001; Remley & Herlihy, 2001). Thus, the school counselor must try to insure that the confidences of the group by members are kept intact by cautioning the members about

[17] For additional information about the practices of group work, consult the Association for Specialists in Group Work (ASGW) at http//asgw.educ.kent.edu.

disclosing confidential information and having the group establish consequences for such a breach (Corey & Corey, 1997; Gazda et al., 2001; Remley & Herlihy, 2001). Corey and Corey (1997) explain what constitutes confidential information: identifying who is in the group or what others in the group said or did. Furthermore, members themselves generally do not breach confidentiality if they disclose what they learned in group sessions as long as they do not talk about "*how* they acquired insights or how they actually interacted in a group" (Corey & Corey, 1997, p. 35).

For members of the group who are minor children, there is another consideration regarding confidentiality, specifically sharing with parents what was discussed in a group session. Corey and Corey (1997) state that it is the responsibility of the group leader to discuss with parents *in advance* the importance of maintaining confidentiality. They clarify that parents can be told about the purpose of the group and provided feedback about how their child is doing, but cautions group leaders from revealing specific things that a child discusses or shares while in group. They suggest that the leader schedule a session with the parent(s) and the child as an approach to giving parents feedback (Corey & Corey, 1997).

Pupil Records

Related to the issue of confidentiality is that of disclosure of information in a student's school records. The laws that apply to the job of a school counselor (as well as other school officials) in Wisconsin are FERPA, or the Family Educational Rights and Privacy Act of 1974 (also known as the Buckley Amendment, 20 U.S.C. §1232(g), 34 C.F.R. 99) which is the federal legislation that covers the areas of privacy of school records and access to such records, and Wisconsin statute section 118.125 ("Pupil

records"). According to Wisconsin Department of Public Instruction, these laws have two major components to them: they both provide for a parent's right to inspect their student's education records (until a student turns 18 or is attending a post-secondary institution, and then those rights transfer to the student), and they limit who can view student education records without parent consent ("Sharing Information," 2001). In Wisconsin, all public schools and any private or parochial schools that receive federal funding must comply with FERPA or risk losing such funding (McCarthy & Sorenson, 1993; Remley & Herlihy, 2001).

As stated above, FERPA gives parents the right to inspect and review their child's education records within a specific time period, but no more than 45 days after the request has been made (20 U.S.C. §1232g(a)(1)(A)). FERPA also gives parents the right to challenge the content of the records to insure that the records are not inaccurate, misleading, or in violation of the child's right to privacy (20 U.S.C. §1232g(a)(2); McCarthy & Sorenson, 1993). If the school does not agree with the proposed amendment to the record, the parents can have a hearing with the end result either being that the school makes the changes as requested by the parents or the parents place a statement in the student's file (Jacob-Timm and Hartshorne, 1998; McCarthy & Sorenson, 1993).

There are several provisions pertaining to access to education records that are relevant to school counselors. First, "education records" do not include the private notes of school counselors, and thus FERPA does not mandate that parents have access to a school counselor's private notes (20 U.S.C. §1232g(a)(4)(B)(i); Fischer & Sorenson, 1996; Tompkins & Mehring, 1993). "Private notes" are those records or notes which are in the counselor's sole possession and which are not shared with anyone except a

substitute (20 U.S.C. §1232g(a)(4)(B)(i); Fischer & Sorenson; Tompkins & Mehring, 1993). Thus, if a counselor shares his or her notes with another counselor, a principal, or a teacher, those notes are no longer "private" and are considered education records (which means that the parents can review them; Fischer & Sorenson, 1996; McCarthy & Sorenson, 1993; Tompkins & Mehring, 1993).

Second, although the rights of the parents transfer to the student when the student turn 18 years-old, if the student is still a dependent of the parent(s) for federal tax purposes, permission need not be sought from the student for parental access (20 U.S.C. §1232g(b)(1)(H); Fischer & Sorenson, 1996). Thus, if a parent would like access to the student's file and the student is 18 but is a dependent on his or her parent(s)' federal tax returns, the school can release the records without obtaining written permission from the student (20 U.S.C. §1232g(b)(1)(H); Fischer & Sorenson, 1996). It is important to note that Wisconsin law states the same provision, yet adds a protection for the student as it provides that if an adult student has informed the school in writing that it may not disclose this information to his or her parents, the school may not do so (Wis. Stat. §118.125(2)(k), 1999-2000).

Third, parental separation, divorce, and custody do not affect the rights of parents to access their child's education records unless there is a court order or other legal document that specifically bars a parent from accessing such records (Jacob-Timm & Hartshorne, 1998; McCarthy & Sorenson, 1993; Wis. Stat. §§118.125(2)(m), 767.24(7)(a), (b), 1999-2000). According to Fischer and Sorenson (1996), failing to provide to a noncustodial parent access to education records if his or her child seems to be an area in which school counselors most often violate FERPA.

There are certain circumstances in which information in the education records can be released without parental consent. For example, education records can be released to school personnel who have a legitimate educational interest, to the school officials at the school to which a student is transferring (with notification to the parents of the transfer), or to a court who has issued a subpoena or judicial order for the release of such education records (after making a reasonable effort to notify pupil's parent or legal guardian; 20 U.S.C. 1232g(b)(1)(A)-(B), (2)(B); Jacob-Timm & Hartshorne, 1998; Wis. Stats. §118.125(2)(L), 1999-2000).

Both Wisconsin statute and FERPA allow certain "directory data" to be released to any person without notification to the parents (20 U.S.C. §1232g(a)(5)(A), (B); Wis. Stat. §118.125(2)(j), 1999-2000). Wisconsin statutes have a provision which states that schools must provide the parents information about what constitutes directory data and give them an opportunity to object to this information being released (Wis. Stat. §118.125(2)(j), 1999-2000). Following notification to parents that schools have the right to release this information without their consent, Wisconsin statutes provide parents with 14 days to object to any or all of this information being released without written consent (Wis. Stat. §118.125(2)(j)(1), 1999-2000).

Wisconsin statute section 118.125(1) has established guidelines for the maintenance of and the confidentiality of all pupil records (e.g., progress records, pupil health records, behavioral records), as well as how and when a student and/or parent or guardian can review such records (see Wis. Stat. §118.125(2), (2m), (3), 1999-2000). It is important that counselors are aware of the differences in these types of records and when and how they can be released or reviewed.

Harassment and Bullying

The laws that protect students from being harassed at school are found under pupil nondiscrimination laws, which safeguard students from being discriminated against based on certain factors. In Wisconsin, the state statute that operates to protect pupils from discrimination is section 118.13 entitled, "Pupil discrimination prohibited," which acts in conjunction with Wisconsin Administrative Code's chapter on Public Instruction section 9, entitled "Pupil Nondiscrimination" (it establishes the procedures for complying with Wisconsin statute §118.13). These laws are the state laws; the primary federal laws that protect students from discrimination (i.e., schools must comply with them or risk losing federal funds) are Title VI of the Civil Rights Act of 1964 and Title IX of the 1972 Educational Amendments (Marczely, 1993 cited in Rowell & McBride, 1996).

Behavior that constitutes discrimination includes harassment, bias and stereotyping if such behavior is related to or because of one of the 14 "protected classes" (Wis. DPI Bulletin, 1999; Wis. Admin. Code § [PI] 9.02(5), Oct. 2001). These 14 protected classes are: sex (gender), sexual orientation, race, religion, national origin, ancestry, creed, pregnancy, marital status or parental status, physical disability, mental disability, emotional disability, and learning disability (Wis. Stat. §118.13(1),1999-2000); Wis. DPI Bulletin, 1999)[18]. Thus, if these students are harassed in any way due to their being a member of such a class, it is considered unlawful discrimination (Wis. DPI Bulletin, 1999).

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[18] For an excellent, in-depth review of what constitutes harassment generally, and within the protected classes (including resources) in Wisconsin, go to www.dpi.state.wi.us/dpi/dlsea/equity/index.html and download the document Understanding Pupil Harassment (pdf) (Wis. DPI Bulletin, 1999).

Assuming behavior is directed towards a student based on one or more of the 14 protected classes, when does it become harassing? According to state law, a behavior becomes harassing when it substantially interferes with a student's school performance or creates an intimidating, hostile or offensive school environment (Wis. Admin. Code § [PI] 9.02(9)). Thus, a single incident could constitute harassment, as could repetitive behaviors done over a course of time (Wis. DPI Bulletin, 1999).

Wisconsin DPI, through a Pupil Harassment Bulletin (1999), states that behaviors including but not limited to name-calling, spreading rumors, telling jokes, hitting, pranks or hazing, graffiti, cartoons, posters, or gestures can be construed as harassment. Wisconsin DPI also stresses that the allegedly harassing incident or situation should "be assessed in light of all the circumstances," considering factors such as the frequency and severity of the behavior, the ages and grade levels of those involved, disparity is size, status, or power, the number of individuals involved, the effects of such harassment on the target, to name a few (Wis. DPI Bulletin, 1999). It also adds that the use of certain derogatory or insulting language or terms, even when used in casual or normal conversation can be construed as harassing, as can the tone or intonation of the words the speaker uses (Wis. DPI Bulletin, 1999).

Wisconsin law requires all school districts (through their school boards) to develop written policies and procedures that provide for investigating the pupil nondiscrimination complaints and ensuring its compliance, and it must include, among other things, standards and rules of behavior, and consequences for the violation of such behavior (such as suspension or expulsion; Wis. Stat. §118,13(2)(a), 1999-2000; Wis. Admin. Code § [PI] 9.03(1), Oct. 2001). Districts must designate an employee to receive

complaints regarding discrimination, must include a pupil nondiscrimination statement and complaint procedure on pupil and staff handbooks, and must include the nondiscrimination statement on course description booklets, and "other published materials distributed to the public describing school activities and opportunities" (Wis. Admin. Code. §§ [PI] 9.04(1), (2); 9.05(2), (3), Oct. 2001).

School counselors need to be aware that districts can face lawsuits if complaints of harassment are ignored or dismissed (Wis. DPI Bulletin, 1999)[19]. A Wisconsin school district was ordered to pay a former student just under $1,000,000 for not only its lack of response to complaints of egregious behavior against a student because of his sexual orientation (in comparison to its response to other students' harassment complaints), but also for the deliberate indifference by persons in positions of authority when presented with the complaints (Logue, 1997; *Nabozny v. Podlesny*, 1996). Wisconsin statute section 118.13(4) imposes a forfeiture of not more than $1,000 on any public school official, employee, or teacher who intentionally engages in conduct which is discriminatory to or causes a person to be denied rights, benefits or privileges (1999-2000).

Probably the most read-about and talked-about form of harassment is sexual harassment (Wis. DPI Bulletin, 1999), and thus this researcher decided to focus briefly on this form. Sexual harassment[20] has become a hot topic in the public schools, as questions such as whether an accidental bump in the school hallway, a mutual show of

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[19] See other cases that have been decided by the United States Supreme Court pertaining to harassment in schools: *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 1999 (student-on-student sexual harassment); *Gebser v. Lago Vista Indep. Sch. Dist*., 524 U.S. 274, 1998 (teacher-on-student harassment); *Franklin v. Gwinnett County Pub. Sch*., 503 U.S. 601, 1992 (teacher-on-student harassment).

[20] For more information about what a school counselor's role is and can be in the education and prevention of sexual harassment, see Rowell and McBride, 1996.

affection by students, or a hug from a teacher constitute sexual harassment (Williams & Brake, 1998).[21] As stated in the definition of "sexual harassment" on page nine of this paper, such behavior must be severe enough to impede the student's ability to learn at school, or creates an intimidating, hostile, or offensive school environment, thus the above behavioral examples would likely not fall within the definition of sexual harassment (Williams & Brake, 1998; Wis. Admin. Code § [PI] 9.02(9), Oct. 2001).

According to Williams and Brake (1998), under the law, there are two categories of sexual harassment: 1) Quid pro quo, which means getting some type of benefit in school (e.g., a good grade) in exchange for a sexual favor or demand (usually involves a person in a position of authority over another), and 2) Hostile environment sexual harassment, which means that the verbal or physical harassment is so severe that it constitutes an abusive or hostile educational environment for the student (see also Wis. DPI Bulletin, 1999). Sexual harassment can occur between students, a student and a school employee, or between or school employees (Williams & Brake, 1998). It includes harassment because of a student's gender as well as his or her sexual orientation (Wis. DPI Bulletin, 1999; see *Nabozny v. Podlesny*, 1996), and thus it is illegal because it is a form of sex discrimination (Rowell & McBride, 1996).

Because of the implications for both the student who is being harassed and the school district if it fails to respond effectively, school counselors must be educated about the legal definitions of harassment as well the behavior or conduct that can be construed as harassment (Wis. DPI Bulletin, 1999). The first step for school counselors is to know

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[21] For an in-depth review of sexual harassment, school's responsibilities, case law, etc., see *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties. Title IX.* U.S. Department of Education, Office of Civil Rights, January 2001 found at www.ed.gov/offices/OCR/publications.html.

the policies and procedures in place in their districts (when and how to investigate), including knowing who the designated employee is in their district who will receive complaints of discrimination (Wis. DPI Bulletin, 1999)[22]. The second step is for counselors to be familiar with the definitions and behaviors that constitute harassment (Williams & Brake, 1998).

The third step, and in this researcher's opinion, one the most important step, is for counselors to take every complaint of harassment seriously and to immediately, thoroughly, fairly and confidentially investigate it and/or refer it to the designated employee (Williams & Brake, 1998)[23]. Also, although counselors normally should not fall into the role of disciplinarian, it is important that they be aware of any action that was taken to end the harassment, including disciplining the harasser, if necessary, and helping the victim to feel comfortable and safe in school again (Williams & Brake, 1998).

Finally, it is incumbent upon the district that it not simply respond to allegations of harassment as its sole mechanism for complying with this statute and fighting harassment; the district must be proactive in combating this behavior by educating all participants in the life of the school—teachers, bus drivers, administrators, support staff,

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[22] By state law, the school district must acknowledge in writing the receipt of the complaint within 45 days of receipt of the written complaint, and it must make a determination of the complaint within 90 days of receipt of the written complaint (unless both parties agree to an extension of time; Wis. Admin. Code § [PI] 9.04(2), Oct. 2001). Procedures are different for a student who is eligible for special education (Wis. Admin. Code § [PI] 9.04(2)(a), Oct. 2001). An outline of the complaint and appeal procedure in Wisconsin is located at www.dpi.state.wi.us/dlsea/equity/pupintro.html.

[23] Again, not every complaint of sexual harassment will be substantiated, nor will every comment, behavior, or joke be assumed sexually harassing. It is the counselor's responsibility to look at the particular circumstances of each incident with seriousness, as well as to take into consideration the factors listed on p. 36 (Wis. DPI Bulletin, 1999).

students, parents (Williams & Brake. 1998; Wis. DPI Bulletin, 1999)[24]. Thus, school counselors will likely play a large role in the education of the students. In fact, it is this researcher's understanding that some districts in the state require its school counselors to address harassment as part of their guidance curriculum.

According to Wisconsin Safe Schools Task Force Final Report (Safe Schools; 1999, p.14) bullying/harassment is defined as "any ongoing physical, verbal or emotional mistreatments. It is an act of violence." Bullying can be done directly to students through taunts, teasing or physical attacks, or can be more indirect, such as social isolation or spreading rumors (Ahmad & Smith, 1994; Smith & Sharp, 1994 cited in Banks, 1997). The reasons for bullying behavior can range from anger, poor self-concept, and loneliness, to the fact that the victims do not defend themselves well against a bully and their friends do not help them (Bremer, 1999; Riese, 2002). Harassment in the form of bullying can lead to school violence or suicide (Safe Schools, 1999), as several schools in the United States and elsewhere have tragically realized. Early identification and intervention can help stop bullying from transcending the schoolyard into adulthood (Safe Schools, 1999). Hence, it is of utmost importance that school counselors respond effectively to students who claim that they are targets for bullying and be aware of whether or not the bullying is based on one of the 14 protected classes (Safe Schools, 1999).

Wisconsin put together a Safe Schools task force with 23 recommendations for greater safety in the Wisconsin's communities, and thus their schools. These

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[24] The U.S. Supreme Court in *Davis* ruling (that students can sue school boards under a Title IX sexual discrimination claim) "does not require school employees to remedy harassment successfully", but rather to reasonably respond to and address harassment (*Davis* cited in Dowling-Sendor, 1999, ¶13).

recommendations can be found in the Wisconsin Safe Schools Task Force Final Report (November, 1999) from the Department of Public Instruction. In addition, the Wisconsin Attorney General's office put together a Safe Schools Legal Resource Manual (1999) which has a wealth of information for educators from the laws about search and seizure to the authority and role of police liaison officers[25].

Special Education

Although school counselors are likely knowledgeable about the laws surrounding special education in the schools, this paper will not be addressing those laws in detail other than to provide resources to readers for further review. Nevertheless, there are certain aspects of the special education laws on which this researcher will briefly focus. First, as a review, the federal laws that apply to students with disabilities are Individuals with Disabilities Education Act (revised 1997; [IDEA]) and Section 504 of the Rehabilitation Act of 1973. The state laws that apply to students with disabilities (the state's adoption of IDEA) are Wisconsin statute section 115 Subchapter V and Wisconsin Administrative Code chapter on Public Instruction section 11.

Second, it is important to know that students who are eligible for special education services under the above-mentioned laws are afforded protections in certain areas that are not provided to students who are not in special education, specifically discipline (Jacob-Timm & Hartshorne, 1998). Students who are in special education can be suspended or removed from the school in the same manner as students in general education for up to ten cumulative days per school year (Special Education, n.d.).

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[25] These Safe Schools resources can be obtained by calling the Wisconsin Department of Justice in Madison, Wisconsin at 608/266-1221. Other Safe Schools resources (via Internet links) can be found at www.dpi.state.wi.us/dpt/dlsea/sspw/safeschool.html.

Suspensions that total more than 10 days may be considered a change in the student's placement, which then requires additional review, including determining whether or not the behavior for which the student in special education is being disciplined is a manifestation of that disability (Special Education, n.d.). Again, school counselors are not normally involved in the discipline issues of students, but it is always wise to be apprised of the laws that apply to the students in those situations.[26]

Malpractice and Other Legal Concerns

An interesting and important point that school counselors must consider when performing duties in their respective schools and districts is that they must work within their own limitations for their own protection (Davis & Ritchie, 1993; Tompkins & Mehring, 1993). This may seem quite elementary, but school counselors generally like to try and help students, parents, or school staff in any way they can, thus it is important that school counselors know their roles and limitations (as well as informing others about the roles and limitations; Davis & Ritchie, 1993). Depending on the school district, it is important to note that many malpractice insurance policies provide coverage for those persons who are performing within the scope of their job duties[27] (thus perhaps not covering duties outside the scope of the job; Tompkins & Mehring, 1993). Moreover, ASCA ethical guidelines expect that it is the responsibility of a professional school

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[26] For more information about discipline of students in Wisconsin, see Wis. Stat. §120.13 (1999-2000). Also see Fischer and Sorenson (1996), chapter 7.

[27] Fischer and Sorenson (1996) state that there are certain acts that, if engaged in by a school counselor, are more susceptible to legal trouble: administering drugs to students, giving birth-control advice, giving abortion-related advice, making statements that might be defamatory, assisting in school locker searches, and violating confidentiality and the privacy of records. For more detailed information, see Fischer and Sorenson (1996), pp. 51-85. Moreover, Remley and Herlihy (2001) assert that other vulnerable areas that apply to school counselors include determining when a student is suicidal or danger to others and deciding what to do to prevent harm in those situations.

counselor to "[function] within the boundaries of individual professional competence" (ASCA ethical guidelines, 1998, E.1(a)).

An area about which school counselors as well as others educators are often concerned is malpractice[28]. Malpractice, also known as "professional negligence" is a "type of civil lawsuit that can be filed against professionals for practicing in a manner that leads to injury to a recipient of their services" (Remley, & Herlihy, 2001, p.145), or "the failure to provide reasonably competent service, through ignorance or negligence, that results in injury or damages to a client," (Fischer & Sorenson, 1996, p. 41). In order to establish a case of negligence in Wisconsin, one must prove the following elements: 1) that a duty of care existed on the part of the defendant; 2) that the defendant breached that duty; 3) that there was a causal connection[29] between the conduct and the injury; and 4) there was damage to the plaintiff as a result of the injury (*Robinson v. Mount Sinai Medical Ctr.,* 1987 cited in *Lenzner v. Shawano-Gresham Sch. Dist.*, 1990).

Thus, it is important to know what the duty of care is for a school counselor. According to Fischer and Sorenson (1996), the counselor has a duty to use professionally accepted skill and care, and conduct him- or herself in a responsible manner. Remley and Herlihy (2001, p.17) state that "counselors must practice in a manner consistent with the way in which a reasonable, similarly educated counselor [sic] would practice in the same set of circumstances." Additionally, one must know what the standard of competent

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[28] If counselors are members of a union, they should be aware of what services the union will provide to them in the event of a malpractice claim against them (e.g., legal representation).

[29] Causal connection, also known as "proximate cause," looks at whether or not the person would have been injured had it not been for the action or inaction of the other person (Remley & Herlihy, 2001). Foreseeability is important in determining proximate cause, in other words, did the counselor know or should s/he have known that his or her actions or inactions would result in the harm to the student? (Remley & Herlihy, 2001).

practice accepted by his or her profession is in his or her geographic region (Fischer & Sorenson, 1996). However, in Wisconsin, the standard of care for professionals is the national standard, not the local one (no case law cited; Wisconsin Bar Bri, 1995, chap. "Torts"). In any event, McCarthy and Sorenson (1993) state that "no matter what the charge—whether malpractice or simple negligence—and no matter how complex, the duty of the counselor never extends beyond exercising that degree of care that is considered reasonable under the circumstances."

Furthermore, "…how a reasonable counselor would handle a given situation is often the key in negligence cases: departures from usual professional standards may give rise to liability, while adherence to them prevents it," (Brougham, 1997, ¶54). According to Fischer and Sorenson (1996, p. 41), in a legal sense, school counselors work in "an ill-defined, ambiguous…gray, uncertain area." Thus, it can be difficult to articulate the scope and limitations of the practice of an individual school counselor. To determine the standard of competent practice would likely include questioning other professionals in the same field about their duties, assessing statutes and case law, reviewing professional association's code of conduct, such as ASCA and the Wisconsin School Counselor Association, etc. (Brougham, 1997; Jacob-Timm & Hartshorne, 1998).

Two areas that could fall within the scope of malpractice are lack of competence within job duties (Remley & Herlihy, 2001) and working outside the scope of one's job duties (Davis & Ritchie, 1993; McCarthy & Sorenson, 1993). ASCA ethical guidelines state that the school counselor will function within the boundaries of professional competence and will strive through personal initiative to maintain professional competence and keep abreast of professional information (1998, E.1(a), (c)). Thus, a

school counselor who does not have the requisite training, licensure, fails to stay current with changes in the law, trends, and job duties, uses poor judgment, or simply does not do his or her job, may be at risk for committing malpractice (Remley & Herlihy, 2001)[30] as well as violating ASCA's ethical obligations. Additionally, according to Remley and Herlihy (2001), counselor incompetence can also be caused by counselor stress, burnout, and impairment.

An example of malpractice due to the alleged incompetence of a school counselor can be found in a recent case in Iowa. Although this is not law that is binding on the courts in Wisconsin, as a neighboring Midwestern state, it may be persuasive if used in court. In this case, a high school guidance counselor was sued by a student who claimed that the counselor was negligent because he breached a duty to competently advise him in choosing an English course (*Sain v. Cedar Rapids Sch. Dist.*, 1996). According to the student, the counselor advised him to take a course that he later found out had not been approved by the NCAA, thus the student was denied a NCAA Division I basketball scholarship (the school district was also sued for alleged failure to submit the course for approval by the NCAA; *Sain v. Cedar Rapids Community Sch. Dist.* 1996*)*. Although the district court granted the school district's motion for summary judgment, the Iowa Supreme Court reversed that decision and remanded the case to the district court "for further proceedings".

Additionally, malpractice can occur if a school counselor practices outside of his or her job duties or outside the bounds of competence (Davis & Ritchie, 1993; Remley &

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[30] It is important that counselors refer students when they are no longer able to provide services within the scope and competency of their jobs (ASCA ethical guidelines, 1998, A.5, E.1(a); Remley & Herlihy, 2001).

Herlihy, 2001). An example of practicing outside the scope of the school counselor's duties is in a situation where an administrator is out of the building and the school counselor is asked to "stand in" for the administrator. Situations can also occur such as disciplining students, conducting a locker search (albeit infrequently), working with law enforcement, administering medication (Corey, Corey, & Callanan, 1993; Fischer & Sorenson, 1996). Are counselors covered by malpractice insurance if something goes awry during the course of doing these temporary administrative duties (not to mention the ethical implications of practicing outside the scope of one's duties)? It is wise to check with your insurance policy and your school district about these issues (Remley & Herlihy, 2001; Tompkins & Mehring, 1993).

Case law in Wisconsin regarding malpractice of school counselors could not be found by this researcher, which leads this researcher to believe that either cases do not get appealed to the Wisconsin Court of Appeals or the Wisconsin Supreme Court (the cases that are reported, i.e., printed), they are settled in lieu of court, or they are rarely pursued (perhaps due to certain statutory immunities; Remley & Herlihy, 2001). The cases that have involved negligence claims[31] are those involving suicide. The landmark case in Wisconsin, which decision still holds today, is that of *Bogust v. Iverson*, a 1960 Wisconsin Supreme Court case. Although school counselors are immune from liability in regard to suicide liability, it is this researcher's opinion that counselors be aware of the Court's line of reasoning in these types of cases, as a few cases have since followed the *Bogust* case and its holding.

[31] Recall that under Wis. Stat. §118.295, 1999-2000, school counselors are immune from civil liability for a good faith attempt to prevent suicide.

In *Bogust*, a college professor/guidance counselor had counseled a college student and then terminated the counseling sessions. Six weeks later the student committed suicide. The parents argued that the termination of counseling sessions was the proximate cause ("wrongful act") of the student's suicide. The court found that the defendant-professor was not negligent in the wrongful death suit, and held that "suicide constitutes an intervening force which breaks the line of causation from the wrongful act to the death, and therefore the wrongful act does not render defendant civilly liable'" (*Bogust,* 1960, p.137). The Court further held that the only way that the wrongful act would be "considered as within and part of the line of causation is where the wrongful act produces a rage or frenzy or uncontrollable impulse, during which state self-destruction takes place," (*Daniels v. New York, N.H. & H.R. Co.*, 1903 cited in *Bogust v. Iverson*, 1960, p. 137).

Two other cases have recently appeared in Wisconsin Courts of Appeal, both of which involved suicide and both of which followed the holding in *Bogust*. The first case involved a 17 year-old student (who had emotional disabilities) who was suspended for using marijuana on school property and sent home. Attempts were made to contact parents but with no success (although formal notice of suspension went home with the student and was mailed home to parents). The student went home and talked to both parents that evening but did not mention the suspension. The next day the student did not go to school; at some point he committed suicide (the exact date was unknown but his body was found four days after he was suspended). The court held that a delayed suicide is not sufficiently connected to any negligence so as the parents could not recover damages from the district (*Lenzner v. Shawano-Gresham Sch. Dist.,* 1990*)*.

The second case involved a student who skipped school, and the school failed to call home to verify the student's absence, according to its policy. Sometime during the day, the student committed suicide. The parents argue that had the school contacted them pursuant to its policy, they could have located their son and, perhaps, prevented his death. Again, the court held that the *Bogust* decision applied in this case, and explained that suicide is the intervening cause of the injury, not the negligence, and the exception--that there was an uncontrollable impulse, frenzy, or rage, during which the deceased commits suicide--did not apply. It reiterated that "when suicide results from a 'moderately intelligent power of choice,' even if the choice is made by a disordered mind, the suicide is a new and independent cause of death that immediately ensues," (*Bogust v. Iverson*, 1960 cited in *McMahon v. St. Croix Falls Sch. Dist.*, 1999*)*.

These cases, aside from showing how the courts in Wisconsin will likely analyze a negligence claim against school district for suicide of a student, should alert school counselors to claims that can be made against school districts for negligence. It is interesting to note that in these two cases, the suicide was an event that occurred without notice to the schools. The school districts were not sued because they failed to notify parents of a student's suicidal thoughts or ideations, but rather did not notify them of a suspension or an absence from school (*Lenzner,* 1990; *McMahon,* 1999)[32]. These cases also should send the message to counselors to follow appropriate district procedure when

[32] But see *Eisel v. Bd. of Educ. of Montgomery County,* 597 A. 2d 447, 456 (Md. 1991) cited in Remley and Herlihy, 2001. In *Eisel*, two school counselors were sued for the wrongful death of a student who committed suicide. The counselors had learned of her intent to commit suicide and confronted her; she denied it. The counselors did not notify her parents, and the student committed suicide. On appeal, the Maryland Court of Appeals sent the case back to the trial court for a determination of liability, stating that the "counselors have a duty to use reasonable means to attempt to prevent a suicide when they are on notice of a child or adolescent student's suicidal intent."

dealing with a potentially suicidal student (e.g., contact parents or law enforcement and do not leave student alone, etc.) to--most importantly--ensure the safety of the student by taking any threats seriously.

Another area in which a lawsuit may find its way to a school counselor's door is through defamation. In Wisconsin, defamation is "a false statement communicated to a third person which tends to harm the reputation of another so as to lower him in the estimation of the community or deter third persons from associating or dealing with him" (*Keip v. Nicewander*, 251 Wis. 2d 479, ¶19, 640 N.W. 2d 564 [Ct. App. 2002]). This can be done verbally (slander) or in writing (libel) (McDaniel, 1999). Thus, in order for defamation to occur, there must be some communication to a third-party (i.e., someone other than the person being defamed has to hear or read it; Fischer & Sorenson, 1996). Counselors may be faced with questions about defamation when writing letters of recommendation for a student, communicating to parents or teachers about a student, providing a reference for a student, or putting notes in a file about the student (McCarthy & Sorenson, 1993).

Although it is possible that counselors can be sued for defamation, according to Fischer and Sorenson (1996, p. 64), if the negative communication was "made in a reasonable manner while carrying out duties and for a proper purpose", they have qualified privilege. In order for the privilege to apply to school counselors, when making the communication they must be acting "in good faith and for a legitimate purpose" (Fischer & Sorenson, 1996, p. 64). Some tips about communication from McDaniel (1999, p. 60) are for counselors to know district and state policies regarding proper communications, to say and write what counselors know or believe to be true (as truth is

a strong defense against defamation), to use language that describes what counselors have actually seen or heard when writing negative comments in letters or permanent records, and for counselors to communicate negative opinions about people only to those who have a legitimate right or need to have your judgments. Again, it is a good idea for a counselor to consult with his or her supervisor, other school counselor colleagues, or an attorney if s/he has concerns or questions (Remley & Herlihy, 2001).

Finally, if a school counselor is faced with a lawsuit[33], the most important things he or she should do are to contact his or her supervisor and the school district's attorney (Remley & Herlihy, 2001). If the school counselor is a member of his or her state teacher's union, s/he would be wise to contact a representative for advice, also. In conclusion, the more information that a counselor has about his or her rights, the better prepared s/he will be.

[33] If a school counselor is named as a defendant or is subpoenaed to testify as a witness (or encounters a situation that requires legal advice), s/he should consult with his or her supervisor and possibly the district's attorney (Remley & Herlihy, 2001). See also Hackbarth, S.J., & DeVaney, S.B. (November, 1995). "Preparing to testify: The school counselor as court witness," *The School Counselor*, 43, 97-102.

CHAPTER THREE

Conclusion and Recommendations

School counselors today are faced with the challenging task of counseling students about complicated and sometimes sensitive topics and maintaining confidentiality, yet working effectively and professionally with parents, administrators, and teachers while knowing their legal and ethical responsibilities throughout it all. During the review and research of the sources cited in this paper, this researcher learned that there are not often clear-cut answers or solutions to the legal and ethical issues that face school counselors. Although this may be frustrating or even intimidating to school counselors, legal and ethical guidance does exist to help counselors evaluate and resolve their dilemmas.

It is the hope of this researcher that this paper can and will be used as a resource for school counselors, school counselor trainees, and training institutions to help them navigate through the maze of laws and ethical obligations that guide their profession. In addition, it is the hope that those who read this paper realize the need for continuing education for counselors in these complicated and murky areas, as well as ongoing research in these areas. According to Davis and Mickelson (1994), due to the difficult positions that school counselors sometimes find themselves in, research needs to be conducted to continue to discover what types of ethical or legal dilemmas face school counselors in the course of their job duties. The results of such research will provide counselors with information and services to help them learn how to handle those situations appropriately (legally and ethically; Davis & Mickelson, 1994). This researcher believes that this type of research and resulting education should be ongoing

for school counselors, especially with the complex issues that have appeared in schools in the past several years. Such research can and should be done to focus on those particular areas that are the most problematic for counselors.

This researcher acknowledges that there were other areas of law and ethics pertaining to school counselors that were not addressed in depth or at all in this paper. For example, special education is an area in which school counselors should be familiar as in many districts the school counselors participate in Individualized Educational Programs meetings. They also work with students who are eligible for special education services (and their parents or guardians), thus it can be helpful to have an understanding of the laws that guide special education in the schools.

Although harassment and bullying were addressed in this paper, the laws and related issues of school safety and school violence were not addressed in detail. These areas are relevant to the job of a school counselor as the counselor will likely be involved in planning, discussion, and/or participating in school safety plans (other areas to be examined: School safety procedure, crisis intervention strategies, student and locker searches, Gun Free Schools Act of 1994, discipline (suspension and expulsion) procedures, etc.).

Other legal areas that have some relevancy to the job of school counselors are truancy, abortion and pregnancy, dual relationships, working with students who are HIV positive or infected with the AIDS virus, youth options, and open enrollment. This list is not exclusive; there are likely other areas with which counselors may want to familiarize themselves. Additional resources are listed in Appendix A.

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Appendix A

Resources

CHILD ABUSE OR NEGLECT

www.dhfs.state.wi.us/dhfs_info/infomemos/2001-12.htm (for a downloadable informational brochure entitled, "It shouldn't hurt to be a child…but sometimes it does" (2001, May). Wisconsin Department of Health and Family Services, Division of Children and Family Services, Bureau of Programs and Policies.

www.preventchildabusewi.org (for information about how to recognize abuse, reporting laws, responding to child abuse, mandatory reporters, and a list of county and tribal social services agencies). Prevent Child Abuse Wisconsin.

www.hcet.org/wfpp/sandr/sassault.html (for downloadable files entitled "Guidelines on 'Teens' and the Law," and "Mandated Reporting of Child Abuse and Neglect")

HARASSMENT/BULLYING

www.bullying.org

www.dpi.state.wi.us/dpi/dlsea/equity/laws.html (Wisconsin Department of Public Instruction Equity Mission—lists the Pupil Nondiscrimination Laws as links)

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HARM TO SELF OR OTHERS

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MISCELLANEOUS

www.schoolcounselor.org (American School Counselor Association website; Under "About ASCA" are the ethical guidelines ["Ethics"] and Position Statements on various topic areas)

www.dpi.state.wi.us (Wisconsin Department of Public Instruction website)

www.wscaweb.com (Wisconsin School Counselor Association website)

www.legis.state.wi.us (To access Wisconsin state statutes, codes, acts, etc.)

PARENTS AND MINORS

Salo, M. M., & Shumate, S. G. (1993). *The ACA legal series: Vol. 4. Counseling minor clients.* Alexandria, VA: American Counseling Association.

SPECIAL EDUCATION

www.dpi.state.wi.us/een/hmlaws.html (Wisconsin Department of Instruction, Special Education, list of Laws, Procedures, Bulletins with links).